Supreme Court, U.S.
FILED
APR 28 1995
OFFICE OF THE CLERK

No. 94-1617

In the Supreme Court of the United States

OCTOBER TERM, 1994

JOSEPH DiSTEFANO, TRUSTEE,
PETITIONER,

v.

KATHERINE DONOVAN, EDWARD H. CAHILL, AND JOHN W. MCKEAN, COMMISSIONERS OF ESSEX COUNTY, MASSACHUSETTS,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PAUL R. DERENSIS
JOHN FOSKETT
Counsel of Record
DANIEL R. DEUTSCH
DEUTSCH WILLIAMS BROOKS
DERENSIS HOLLAND & DRACHMAN, P.C.
99 Summer Street
Boston, MA 02110-1235
(617) 951-2300

Blanchard Press, Inc., Boston, Mass — Law Printers (617) 426-6690

QUESTIONS PRESENTED FOR REVIEW

1. Should this court exercise its power to review the final judgment of the Massachusetts Appeals Court under 28 U.S.C., § 1257(a), where no federal question was ever raised in or passed upon by the Massachusetts state courts?

2. Should this court grant the Petition insofar as it challenges the composition of the jury in petitioner's civil lawsuit in Massachusetts state court on the grounds that certain towns and cities within the subject county were over-represented in light of their respective percentages of the county's population, where petitioner can show no systematic or intentional exclusion and can establish no special or distinct characteristics of persons from the over-represented or under-represented cities and towns, and where the Appeals Court's decision is entirely consistent with decisions of this court and of the other federal and state courts?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
STATEMENT OF JURISDICTION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	4
I. PETITIONER HAS NEVER RAISED OR PRESSED A FEDERAL QUESTION AT ANY STAGE OF THE PROCEEDINGS IN THE STATE COURTS, NOR HAVE THOSE COURTS HAD THE OPPORTUNITY TO PASS ON ANY SUCH QUESTION.	4
II. THE WRIT SHOULD BE DENIED BECAUSE THE STATE COURT'S DECISION IS COMPLETELY CONSISTENT WITH DECISIONS BY THIS COURT AND OTHER FEDERAL AND STATE COURTS, AND PETITIONER'S CASE PRESENTS NO APPROPRIATE OCCASION FOR A CHANGE IN THE LAW.	7
CONCLUSION	11

TABLE OF AUTHORITIES

CASES:

	Page
Bankers Life and Casualty Company v. *Crenshaw*, 486 U.S. 71 (1988)	6, 7
Barber v. *Ponte*, 772 F.2d 982 (CA 1 1985) (en banc) *cert. denied* 475 U.S. 1050 (1986)	8
Commonwealth v. *Bastarache*, 382 Mass. 86, 414 N.E.2d 984 (1980)	10
Curtis v. *Loether*, 415 U.S. 189 (1974)	7
Dalis v. *Buyer Advertising Inc.*, 418 Mass. 220, 636 N.E.2d 212 (1994)	7
Digital & Analog Design Corp. v. *North Supply Co.*, 590 N.E.2d 737 (Ohio 1992)	7
Duren v. *Missouri*, 439 U.S. 357 (1979)	8
Galvin v. *Welsh Manufacturing Co.*, 382 Mass. 340, 416 N.E.2d 183 (1981)	7
Heath v. *Alabama*, 474 U.S. 82 (1985)	6, 7
Illinois v. *Gates*, 462 U.S. 213 (1983)	6
Interstate Circuit, Inc. v. *Dallas*, 390 U.S. 676 (1968)	4
Lockhart v. *McCree*, 476 U.S. 162 (1986)	8
Michigan-Wisconsin Pipe Line Co. v. *Calvert*, 347 U.S. 157 (1954)	4
O'Connor v. *State of Nevada*, 507 F.Supp. 546 (D. Nev. 1981) *aff'd* 686 F.2d 749 (CA 9 1982) *cert. denied* 459 U.S. 1071 (1982)	7
Oleson v. *Trust Co. of Chicago*, 245 F.2d 522 (CA 7 1957) *cert. denied* 355 U.S. 896 (1957)	7
Pearson v. *Yewdall*, 95 U.S. 294 (1877)	7
Sheppard Envelope Co. v. *Arcade Malleable Iron Co.*, 335 Mass. 180 (1956)	10
Street v. *New York*, 394 U.S. 576 (1969)	5
Thiel v. *Southern Pacific Co.*, 328 U.S. 217 (1946)	8
United States v. *Butera*, 420 F.2d 5644 (CA 1 1970)	9
United States v. *Young*, 822 F.2d 1234 (CA 2 1987)	7

Page

Webb v. *Webb*, 451 U.S. 493 (1981) 6
Yee v. *City of Escondido, California*, 503 U.S. 519, 112 S.Ct. 1522 (1992) 6

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES:

28 U.S.C., § 1257 ..... 1, 4, 5
28 U.S.C., §§ 1861, *et seq.* 8
Pub. L. 100-352, § 3, 102 Stat. 662 4
M.G.L. c. 211A, §§ 1 *et seq.* 4
M.G.L. c. 234A, §§ 1, *et seq.* 5
Supreme Court Rule 14.1 ..... 3, 5

In the
Supreme Court of the United States

OCTOBER TERM, 1994

94-1617

JOSEPH DiSTEFANO, TRUSTEE,
PETITIONER,

v.

KATHERINE DONOVAN, EDWARD H. CAHILL, AND JOHN W. MCKEAN, COMMISSIONERS OF ESSEX COUNTY, MASSACHUSETTS,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF JURISDICTION

The basis for this Court's jurisdiction asserted by petitioner is 28 U.S.C., § 1257(a), which authorizes review of a final judgment rendered by the highest court of a state in which a decision could be had, where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the United States Constitution, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution. Respondents challenge this assertion of jurisdiction because the federal question on which the Petition

now rests was never raised or pressed at any stage of the proceedings in the Massachusetts state courts, and was never passed upon by those courts.

STATEMENT OF THE CASE

Generally, respondents the Commissioners of Essex County are content with petitioner DiStefano's Statement of the Case, with the exception of his assertion that prospective jurors' "frequent exercise" of the option to designate jury service at a courthouse closer to their residences by certifying an "extreme transportation problem" resulted in a systematic geographical misrepresentation in the juror pool [Petition 10]. In fact, the only evidence presented by DiStefano was that this "misrepresentation" occurred for the first three months of 1990 and in the juror pool at the trial of his claim [Petition App. 19, 27].[1]

In addition, the Commissioners supplement DiStefano's Statement of the Case as follows. The claim set forth in DiStefano's Complaint alleges nuisance and trespass on land under Massachusetts common law [Petition App. 6-7]. Of the thirty-six prospective jurors in the pool for his trial, nine lived in Lawrence, Massachusetts; eleven lived in Methuen; seven lived in North Andover[2]; and one lived in each of Danvers, Hamilton, Groveland, Beverly, Middleton, Haverhill, Rowley, Lynn, and Lynnfield [Petition App. 27][3]. Of the fourteen jurors actually seated, seven lived in a combination of Lawrence, Methuen, North Andover, and Andover, with

[1] References to the Appendix to the Petition are designated as "Petition App. ____". References to the Record Appendix filed in the Massachusetts Appeals Court are designated as "A. ____".

[2] Given that one of the jurors actually seated lived in Andover [A. 49], DiStefano's counsel may have intended to include him in the group attributed to North Andover.

[3] No juror seated was from Hamilton, while one juror actually seated lived in Amesbury [A. 43-56]. Accordingly, DiStefano's counsel may have mistaken Hamilton for Amesbury in his assertion to the trial court [Petition App. 27].

the remainder distributed equally among Amesbury, Lynnfield, Middleton, Rowley, Lynn, Groveland, and Beverly [A. 43-56]. The four communities allegedly over-represented (Lawrence, Methuen, Andover, and North Andover) were, respectively, the second, seventh, ninth, and thirteenth most populous communities in the county as of 1989 [Petition App. 21-22]. DiStefano has at no stage of the proceedings presented any evidence that persons living in these communities share any distinct racial, religious, ethnic, social, or economic characteristics. Of the fourteen jurors actually seated, there were six males and eight females [A. 43-56]. Twelve were married and two were divorced [*Id.*]. The jurors' ages were distributed as follows: two were between 18 and 30; five were between 30 and 40; four were between 40 and 50; one was between 50 and 60; one was older than 60; and one did not list age [*Id.*]. Three jurors had attended or completed high school; eight had attended or completed college; two had earned postgraduate degrees; and one did not indicate educational level [*Id.*]. The jurors' occupations included senior warehouser; construction manager; secretary; medical secretary; nursing assistant; meat cutter; consulting engineer; computer operator; "self employed"; "community relations"; accountant; appointment secretary; accounting supervisor; and personnel director [*Id.*]. Six were employed in the "over-represented" communities, while eight were employed elsewhere [*Id.*].

Finally, DiStefano's Statement of the Case fails to include the information required by Supreme Court Rule 14.1(h). In fact, he did not raise at any stage of the proceedings in the Massachusetts Superior Court, Appeals Court, or Supreme Judicial Court the federal question sought to be reviewed [Petition App. 1-46]. Instead, that question has been raised for the first time in his Petition [Petition i, 21-22].

REASONS FOR DENYING THE WRIT

I. Petitioner Has Never Raised Or Pressed A Federal Question At Any Stage Of The Proceedings In The State Courts, Nor Have Those Courts Had The Opportunity To Pass On Any Such Question.

This Court should not reach the merits of the Petition because DiStefano has never raised nor pressed in the Massachusetts state courts the federal question to which his Petition now alludes. Since he seeks relief from a decision of the Massachusetts Appeals Court, jurisdiction of this Court is premised on 28 U.S.C., § 1257(a), as amended by Pub. L. 100-352, § 3, 102 Stat. 662. Section 1257(a) provides, in pertinent part, that a

> "[f]inal judgment[] rendered by the highest court of a State in which a decision could be had, may be reviewed ... by writ of certiorari ... where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, ..., the United States."[4,5]

[4] The first clause of §1257(a) is irrelevant, since neither the Petition nor the record give any indication that the "validity of a treaty or statute of the United States" has been "drawn in question."

[5] Although the Massachusetts Appeals Court is not the court of last resort in Massachusetts, *see* M.G.L. c. 211A, §§ 1, 10, DiStefano's application for further appellate review was denied by the Massachusetts Supreme Judicial Court [Petition App. 46]. The Commissioners therefore have assumed that there is a final judgment by the "highest court of [Massachusetts] in which a decision could be had." *See, e.g., Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 678 n. 1 (1968); *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 160 (1954).

The only federal Constitutional or statutory provision referred to in the Petition is the Seventh Amendment to the United States Constitution [Petition i, 21-22]. Accordingly, the only conceivable bases for § 1257(a) jurisdiction are (1) an argument that the Massachusetts statute governing juror selection, M.G.L. c. 234A, §§1, *et seq.*, is repugnant to the Seventh Amendment, or (2) an argument that DiStefano specially set up or claimed a title, right, privilege, or immunity under the Seventh Amendment. The record, however, is devoid of any indication that either of these arguments was even raised in the state courts, let alone pressed. DiStefano's Complaint makes no reference to the Seventh Amendment [Petition App. 1-8]. Likewise, DiStefano's Motion and Affidavit to Challenge Composition of Juror Pool, filed in the Massachusetts Superior Court, fails to mention the Seventh Amendment, and is by its terms confined to a claim under the Massachusetts statute [Petition App. 9-12]. The arguments reflected by the transcript of proceedings in the Superior Court on DiStefano's motion are similarly cabined [Petition App. 25-34]. Finally, there is nothing in the Appeals Court's opinion which refers to the Seventh Amendment, and that court limited its decision to consideration of the Massachusetts statute and a Massachusetts constitutional provision regarding jury trials [Petition App. 43-44].[6] At no stage of the proceedings in the state courts was any other federal provision articulated [Petition App. 1-46]. Instead, initial mention of the Seventh Amendment appears in the Petition, and then

[6] Where the state court "has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street* v. *New York*, 394 U.S. 576, 582 (1969). The Petition makes no such showing. Moreover, the Petition violates the requirements of Supreme Court Rule 14.1(h), which mandates that a petition seeking § 1257 review "specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them . . . ; and [such specific references to the record] as will show that the federal question was timely and properly raised . . . ".

only in the sections entitled "Constitutional Provision and Statutes" and"Conclusion" [Petition i, 21-22].

On occasion, this Court has indicated that it is "without jurisdiction" under § 1257 to review the judgment of a state court where the federal question "was not raised below". *Webb* v. *Webb*, 451 U.S. 493, 495 (1981) (construing § 1257 prior to its amendment in 1988). At other times, the Court has suggested that this rule is not jurisdictional, but is, rather, a "prudential restriction that does not pose an insuperable bar to [this Court's] review." *Bankers Life and Casualty Company* v. *Crenshaw*, 486 U.S. 71, 79 (1988) [citing *Illinois* v. *Gates*, 462 U.S. 213, 218-19 (1983)]. Even if merely a "prudential" rule rather than an absolute jurisdictional block, however, the doctrine "creates, at the least, a weighty presumption against review", *Heath* v. *Alabama*, 474 U.S. 82, 87 (1985), which has been ignored only in "very rare exceptions", *Yee* v. *City of Escondido, California*, 503 U.S. 519, 112 S.Ct. 1522, 1531 (1992).

Assuming that DiStefano's failure to raise his federal question in the state courts is not jurisdictional, this Court should refuse his invitation for review. Foremost among the reasons supporting refusal are principles of comity in the federal-state system which "require that the state courts be afforded the opportunity to perform their duty, ..." *Webb*, 451 U.S. at 499. Practical considerations lead to the same result. The parties are thereby given the chance to "develop the record necessary for adjudicating the issue"; the state courts are permitted "to exercise their authority"; and the federal claims at issue "will be adjudicated in the state courts where necessary to dispose of the case." *Webb*, 451 U.S. at 500-01. Review of DiStefano's tardily-raised Seventh Amendment claim would "short-circuit a number of less intrusive, and possibly more appropriate, resolutions", such as revision of the Massachusetts statute by the State Legislature or the generation of a "well-developed record and a reasoned opinion on the merits" by the Massachusetts courts. *Bankers Life and Casualty Company*, 486 U.S.at 79-80. As it has repeatedly

done in similar cases, this Court should decline to review the Appeals Court's decision on the grounds that DiStefano's federal claim was not timely or properly raised. *Heath*, 474 U.S. at 87; *Bankers Life and Casualty Company*, 486 U.S. at 80; *Yee*, 112 S.Ct. at 1531.[7]

II. The Writ Should Be Denied Because The State Court's Decision Is Completely Consistent With Decisions By This Court And Other Federal And State Courts, And Petitioner's Case Presents No Appropriate Occasion For A Change In The Law.

Even if this Court generously opts to consider DiStefano's untimely Seventh Amendment challenge, the granting of the writ would be improvident. In an unbroken, uniform line of longstanding precedent, this Court and other courts in various federal and state jurisdictions have held that the Seventh Amendment's guarantees do not apply to civil trials in the state courts. *See Pearson* v. *Yewdall*, 95 U.S. 294, 296 (1877); *Curtis* v. *Loether*, 415 U.S. 189, 192 n. 6 (1974); *Oleson* v. *Trust Co. of Chicago*, 245 F.2d 522, 524 (CA 7 1957) *cert. denied* 355 U.S. 896 (1957); *O'Connor* v. *State of Nevada*, 507 F.Supp. 546, 548 (D.Nev. 1981), *aff'd* 686 F.2d 749 (CA 9 1982) *cert. denied* 459 U.S.1071 (1982); *Dalis* v. *Buyer Advertising, Inc.*, 418 Mass. 220, 223 n. 4, 636 N.E.2d 212, 215 n. 4 (1994); *Galvin* v. *Welsh Manufacturing Co.*, 382 Mass. 340, 345, 416 N.E.2d 183, 186 (1981); *Digital & Analog Design Corp.* v. *North Supply Co.*, 590 N.E.2d 737, 742 (Ohio

[7] In support of his belated effort to commence a Seventh Amendment attack on the Appeals Court's opinion, DiStefano cites *United States* v. *Young*, 822 F.2d 1234, 1239 (CA 2, 1987) for the principle that "[i]t is never too late to raise a constitutional challenge to the makeup of the juror pool." [Petition 19]. The *Young* court in fact only considered an untimely argument hypothetically. *Id.* More important, the Court of Appeals' decision in *Young* was wholly unconcerned with the "not pressed or passed upon below" rule governing *this* Court's authority to review the final judgments of state courts of last resort, and is simply inapposite.

1992). DiStefano cites no case to the contrary.

Moreover, DiStefano cites no case holding that, under the Seventh Amendment or under any conceivable analogues (*e.g.*, the federal Jury Selection Act, 28 U.S.C., §§ 1861, *et seq.*, and the Sixth Amendment to the United States Constitution), there is a right to proportional geographic representation such as he urges here. This Court "has never gone so far as to hold that the constitution requires venires to be, statistically, a substantially true mirror of the community." *Barber* v. *Ponte*, 772 F.2d 982, 997 (CA 1 1985) (en banc) *cert. denied* 475 U.S. 1050 (1986) [citations omitted]. "Strict statistical analysis has been used only in situations where *special* groups that have been discriminated against are involved". *Id.* at 998 [citing *Duren* v. *Missouri*, 439 U.S. 357, 364 (1979)] [emphasis in original]. In this context, "[t]he essence of a distinctive group is that its members share specific common characteristics." *Id.* Therefore, this Court has squarely held that, in order to establish a violation of the "fair-cross-sectional requirement" of the Sixth Amendment, even a defendant in a criminal case must establish, *inter alia*, that "the group alleged to be excluded is a 'distinctive' group in the community" and that there has been "systematic exclusion of the group in the jury selection process". *Duren*, 439 U.S. at 364. Accordingly, this Court's jury representativeness cases, "whether based on the fair-cross-section component of the Sixth Amendment or the Equal Protection Clause of the Fourteenth Amendment, have involved such groups as blacks, ...; women, ...; and Mexican-Americans, ..." [citations omitted], and have turned at least in part on the " 'appearance of unfairness' " resulting from juror exclusion "on the basis of some immutable characteristic such as race, gender, or ethnic background". *Lockhart* v. *McCree*, 476 U.S. 162, 175 (1986). *Cf. Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220-24 (1946) ("systematic and intentional exclusion" of "all persons who work for a daily wage" constituted discrimination against identifiable group which was at odds with "American tradi-

tion of trial by jury", at least in context of federal Jury Selection Act).

Even assuming that the Seventh Amendment applies to DiStefano's lawsuit and that the foregoing rules would control analysis under that Amendment, his claim is wholly without support. First, as the Appeals Court noted, there has been no "suggestion of intentional discrimination". [Petition App. 44], or systematic exclusion by respondents of jurors from towns within Essex County other than the four towns which DiStefano asserts were disproportionately represented on his jury. Instead, it is undisputed that the putative "under-representation" occurred solely as a result of random responses by prospective jurors to the question whether travel to the courthouse would constitute an "extreme transportation problem". [Petition App. 26-34]. Second, as the Appeals Court also concluded, DiStefano has made absolutely no showing "that a jury chosen at random from the four overrepresented communities would differ in background or outlook from a jury chosen at random from all of Essex County." [Petition App. 44]. *Cf. United States* v. *Butera*, 420 F.2d 564, 572 (CA 1 1970) *overruled on other grounds by Barber*, 772 F.2d at 996 ("... we cannot see that the views and attitudes of voters of one city or town are in any way 'distinct' from those of voters in a neighboring community.") In fact, the composition of the jury which was actually seated for the trial of DiStefano's claim exhibited remarkable diversity of age, gender, educational background, and occupation. [A. 43-56]. DiStefano has advanced no evidence that there are any distinct racial, ethnic, social, or economic characteristics peculiar to residents of the four allegedly "over-represented" communities. [Petition App. 9-22, 26-40].

DiStefano therefore has failed to demonstrate a conflict between (1) the Appeals Court's decision and (2) any decisions by this Court, by other federal courts, or by other state courts construing the Seventh Amendment or any of its analogues. Nor has he articulated the existence in this case of a substantial and unsettled question of federal law.

Finally, even if this Court were disposed to extend the Seventh Amendment in a manner unforeseeable in light of existing precedent, the case at bar presents a highly inappropriate vehicle. DiStefano's lawsuit raises a garden variety claim of nuisance and trespass on land under Massachusetts common law. *See Sheppard Envelope Co.* v. *Arcade Malleable Iron Co.*, 335 Mass.180, 187 (1956). He has established nothing about the purported geographic under-representation on his jury of residents of Essex County which indicates that a distinct and identifiable group of persons has been systematically and intentionally excluded in a manner suggesting unfairness. No need exists for this Court to intercede on DiStefano's behalf with respect to his jury trial rights, because Massachusetts courts have zealously safeguarded the right under state law to be free from "a substantial, identified exclusion of any distinct, qualified segment of society from jury lists, whether or not the exclusion was intentional." *Commonwealth* v. *Bastarache*, 382 Mass. 86, 102, 414 N.E.2d 984, 994-95 (1980). The Petition is nothing more than a thinly-disguised attempt to have this Court decide a question which properly is resolved purely under Massachusetts state law, and the writ should be denied.

CONCLUSION

For the reasons set forth herein, the writ of certiorari should be denied.

Respectfully submitted,

PAUL R. DERENSIS
JOHN FOSKETT
Counsel of Record
DANIEL R. DEUTSCH
DEUTSCH WILLIAMS BROOKS
DERENSIS HOLLAND & DRACHMAN, P.C.
99 Summer Street
Boston, MA 02.10-1235
(617) 951-2300
Counsel for Respondents